2. THE COMMISSION HAS DEFINED THE JOINT MARKETING FREEDOMS UNDER SECTION 272(g) TO INCLUDE MORE THAN SIMPLY SELLING SERVICE TO A NEW CUSTOMER [Section VI]

In Paragraph six of the NPRM, the Commission acknowledges that the BOCs are permitted to provide "one-stop shopping" under the 1996 Act, giving consumers the ability to buy a variety of services from a single provider. This mode of business organization is pro-competitive, as economies of scope are created when firms can produce different services together.[27] The actions of both BOCs and large IXCs are governed by separate joint marketing provisions. In an apparent effort to ensure that neither the BOCs nor the large IXCs be unfairly advantaged, as Congress intended, the Commission tentatively concluded that the "market or sell" language in Section 272(g)(2), and the "jointly market" language applying to large IXCs in Section 271(e)(1), should be construed similarly.[28]

Despite the Commission's tentative conclusion, AT&T seeks to have the Commission limit the pro-competitive nature of "one-stop shopping" and the joint marketing provisions of Section 272(g). AT&T advocates a narrow definition of "jointly market" as used in Section 271(e)(1). Such a definition would provide AT&T with a greater ability to provide jointly local and interexchange services, as Section 271(e)(1) is the only restriction in this area applicable to large interexchange carriers.[29] At the same time, AT&T's proposed definition would hamstring the BOC's ability to provide "one-stop shopping" under Section 272(g)(2). AT&T accomplishes

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[27] See NPRM at fn 14.

[28] NPRM at ¶91.

[29] AT&T goes so far as to revise Section 271(e)(1) with its own listing of the conditions when the "jointly market" requirement applies. See AT&T Comments at 53. There is no basis for AT&T's conditions, and the Commission should reject AT&T's attempt to literally rewrite the statute.

this by defining the term "marketing" as limited to the initial sale of services or products. AT&T's definition would not include any activity after the initial sale is made (e.g., post-sale single-point-of-contact or single bill). To any company involved in marketing a service or product, this is an absurd result.

AT&T's definition of joint marketing is artificial and deliberately ignores the nature of how telecommunications services are provided today. Currently, carriers' relationships with customers are continuing in nature. Unlike the sale of goods, where a customer pays a price and receives a product, there is no "absolute closing" of a sale in the telecommunications service world. While carriers may be selected by customers, the ability to change carriers, to dial around, and to bill calls to another carrier means that carriers--even those with long-standing relationships with a particular customer--are constantly marketing and selling services to customers.[30] A sale is "made" every time a toll call is made, and even non-usage sensitive services such as Caller I.D. are "marketed" to remind customers of the value received from the service. Such activity is essential in a business climate where customers are constantly reminded that they have choices in how they acquire telecommunications services. Bill inserts advertise new services, and customer complaints are handled with care to maintain customer good will. AT&T constantly markets various calling plans, calling cards, 1-800 dial around numbers, even

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[30]AT&T's position on the use of CPNI exalts its favored portion of the statute over other subsections in an attempt to reach its preferred result. See AT&T Comments at 59. In brief, Section 222 governs how customer proprietary network information must be treated by carriers; Section 272(g) permits certain joint marketing freedoms and states that such joint marketing is not discrimination as described in Section 272(c). Should a carrier comply with the requirements of Sections 222 and 272(g), Congress' intent will be done. The Commission need not issue further regulatory rules on this subject.

its trade name, all in an effort to acquire not only new customers but to retain current customers. To conclude that any such "post-sale" activity is not "marketing" is to ignore reality.

Congress was aware of these facts when it passed the 1996 Act. Narrowly interpreting the terms used in Sections 271(e)(1) and 272(g)(2) would disregard the expectations of Congress and ignore the environment in which all carriers will soon operate. AT&T's position on this point should be rejected.[31]

3. THE JOINT MARKETING FREEDOMS CONTAINED IN SECTION 272(g) CANNOT BE LIMITED BY THE STRUCTURAL REQUIREMENTS OF SECTION 272(b) [Section VI]

Within Section 272, Congress provided at least two requirements that the Commission must reconcile: the structural obligation in Section 272(b) and the "jointly market and sell" freedoms within Section 272(g). Section 272 also permits the BOC and its affiliate to joint market on an exclusive basis without implicating the non-discrimination requirements of Sections 272(c). Independent operations cannot be read to mean a prohibition on customer referrals, joint marketing, or joint advertising, or to require separate logos, distinct names, separate billing, collections, and ordering processes, or prohibit shared customer databases or

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[31]MCI, too, seeks to define joint marketing to benefit itself over the BOCs. It advocates that one-stop marketing not be considered "joint marketing" under Section 271(e) "since IXCs are permitted to provide both types of service through the same entity," while BOCs are not. On the apparent theory that one company cannot provide "joint" marketing by itself, MCI asserts that because it can sell local and interexchange service on an integrated basis in the same corporate entity, its marketing efforts cannot be limited. Under this reasoning, Section 271(e) would be without effect. MCI's protests notwithstanding, Congress explicitly limited how large interexchange carriers are to market service. Despite the lack of separation requirements for interexchange carriers, the limitations contained in Section 271(e)(1) remain. Sections 271(c) and 272(g) are to be interpreted compatibly. To do otherwise would place large interexchange carriers at a significant competitive advantage--clearly not the intent of Congress when it included Sections 271(e) and 272(g) in the Act.

information systems.[32] Commenters that argue these propositions would have the Commission reading Section 272 in piece parts rather than as a whole as Congress intended.[33]

Commenters apply their own perspectives to each provision, often without acknowledging the other section.[34] At a minimum, whatever action the Commission takes, it must permit the BOCs and their affiliates to jointly market local and interexchange service so that they are not prohibited from offering comparable products to those carriers not restricted

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[32]MFS Comments at 14-16. In addition, in response to AT&T's contention that joint marketing of BOC affiliate long distance with BOC local service is prohibited for new BOC customers, the Commission again only needs to review the statutory language to conclude that AT&T's position is without merit. Simply put, BOCs and their affiliates have joint marketing freedoms via Section 272(g) and equal access obligations as a result of Section 251(g). The breadth of the joint marketing freedoms have been addressed here and need not be repeated. The obligations contained in Section 251(g) are limited to any "court order, consent decree, or regulation, order or policy of the Commission" that applied to the BOC on the day prior to the enactment of the 1996 Act. On its face, Section 251(g) does not mention or preclude joint marketing, and the Commission has no basis to issue any regulations to reach such a result.

[33]The Commission must not attempt to apply restrictions similar to Section 274 to the Section 272 affiliates. MCI's contention that the structure of Section 274 requires an overlay of Section 274(b) requirements over the simple statement of Section 272(b)(1) is nonsense. Section 274(b) begins with a sentence requiring that the BOC Section 274 affiliate be "operated independently." See MCI Comments at 23-27. This sentence is then followed by one that includes specific structural and non-structural requirements. To the extent that the nine elements of the second sentence of Section 274(b) are read to amplify the term "operate independently" in the electronic publishing context, the same cannot be said for the term "operate independently" in Section 272. There is substantial overlap in the requirements of Section 274(b) and Section 272 (b), (c) and (e). To read the Section 274(b) requirements into Section 272 (b)(1) would be to render much of the remainder of Section 272 useless.

[34]MCI's discussion on page 48 of its Comments is an example. There is no basis for MCI's view that joint marketing can only be conducted by one Bell company subsidiary. The distinction made between "BOC affiliate" in Section 272(g)(1) and "BOC" in Section 272(g)(2) evidences Congress' intent that both entities would be permitted to joint market each other's services, under certain specified conditions.

under Section 272. To do anything less is to misinterpret the explicit words and intent of Congress.

The most compelling evidence of why the Commission must grant the BOCs flexible joint marketing freedom is the realities of how "one-stop" marketing efforts are put together. Carriers providing a "one-stop shop" will package local, long distance, wireless, paging, Internet access, voice mail, home security, and fee-based television in their marketing efforts. The consumer will be able to contact such a carrier and, with one call, make a decision as to whether to establish service for all the desired telecommunications services. Services will be billed on one bill; the customer will use one phone number to contact all service providers. This ability to acquire, pay for, and ask questions about service--in one-stop--is the sort of innovation Congress intended under the 1996 Act.[35]

Complex behind-the-scenes coordination will be needed to provide such one-stop service. MCI One appears to have accomplished this already. It advertises that its partnership with Westinghouse Security Systems, Inc., that permits tying Westinghouse's home security service to MCI's paging and cellular service. Through this interconnection, the homeowner can be paged or called on his or her cellular phone in an emergency or when a family member such

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[35]MCI may be the first company to provide such an integrated package, although wireline local service is not yet part of its package, called MCI ONE. According to its own news release, MCI will offer long distance, cellular, paging, Internet access, e-mail, a calling card, home security, and a personal 800 number service. All services will be integrated using an "intelligent network," according to MCI. A personal computer can also be ordered through MCI, to be delivered to the customer's home or office, with a tutorial available. Customers of MCI One will receive one bill for all services and have one phone number to call for service. See http://www.webcome.com/longdist/68/68-2.html.

as a child enters a customer's home.[36] Taking an order for such a package of services implies that Westinghouse and MCI computer systems interface. Delivering that service requires the interfacing of two independent companies' networks--Westinghouse's security network and MCI's wireless network. No one would suggest that permitting the MCI and Westinghouse networks to interface lessens the independence of either MCI or Westinghouse, either at the order-taking or the service provision level.

To compete, BOCs and their separated affiliates will need to operate as MCI appears to operate. To accomplish this, employees of different affiliates will need to be properly trained on different software programs, so that they can offer packages of services customized to consumer desires. Employees will have to take direction from different affiliates and non-affiliates so that each service is marketed properly, just as MCI employees have likely been trained by Westinghouse and vice versa. Direct communications among the separate installation and repair personnel will be needed to ensure the timely commencement of service or the provision of maintenance. Sales representatives may even need to seek permission in real time to offer special discounts to prospective customers in an effort to match offers made by competitors. Of course, none of this marketing activity can be effective without supervision. Direction from individuals with marketing or network planning responsibilities for all participating entities is appropriate, as well, to ensure that one-stop services can be properly marketed and delivered. This is the type of interface among affiliates and joint venturers contemplated by the statute's joint marketing provisions.

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[36] See MCI News Release at http://www.webcom.com/longdist/68/68-2.html

Should the Commission promulgate any separation requirements that limit the BOCs or their affiliates provision of an MCI One-type service, telecommunications markets will be less competitive. BOCs' affiliates will be unable to compete for customers as non-BOCs such as MCI will. Creating such a semi-competitive industry would clearly be contrary to both the literal words within the 1996 Act as well as the intent of Congress. As a result, no rules should be promulgated that will prevent the BOCs from establishing the sort of "back office" support and direction that is the foundation for joint marketing as described in Sections 272(g)(2) and (3).

F. THE 1996 ACT REQUIRES THAT THE COMMISSION NOT IMPOSE DOMINANT CARRIER REGULATION AS IT WOULD SERVE ONLY TO DIMINISH COMPETITION [Section VIII]

1. IN LIGHT OF THE STATE OF FACTS THAT WILL EXIST WHEN THE BOC SECTION 272 AFFILIATE BEGINS TO OFFER SERVICE, IT SHOULD BE REGULATED AS NON-DOMINANT [Section VIII]

Some commenters suggest that BOC interLATA affiliates should be shackled by dominant carrier regulation that is presently applicable to no one.[37] Before a BOC affiliate is permitted to offer in-region interLATA services, the Commission will have determined either that the Section 272 interLATA provider's affiliated BOC is subject to facilities-based competition under Section 271(c)(1)(A) or that the BOC's network has been opened to make it possible for such competition to occur pursuant to Section 271(c)(1)(B).

Rather than accept Congress' decision that following the implementation of Sections 251, 252, and 271 and the establishment of a Section 272 affiliate that the "bottleneck" will have been

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[37]AT&T Comments at 61-66; MCI Comments at 65.

sufficiently opened and become sufficiently immune to discrimination, numerous incumbent IXCs attempt to convince the Commission to minimize the legitimate effects of BOC affiliate entry. Congress has recognized what the IXCs commenting in this docket have not: when the BOCs have passed through the Section 251, 252, and 271 gauntlet, their interLATA affiliates should be subject only to Section 272 regulation.

Congress' intent in enacting the 1996 Act was to facilitate the entry of competitors into both the local exchange and the interexchange markets. To impose dominant carrier regulations will only serve to delay or impede a BOC affiliate's efficient provision of interexchange services and the additional consumer benefits that will accompany such competitive entry.

2. ANALYSIS OF THE BOC SECTION 272 AFFILIATE FAILS TO DEMONSTRATE MARKET POWER [Section VIII]

Under its existing rules, a "dominant carrier" is defined by the Commission as a carrier that possesses "market power (i.e., power to control prices)," and a "non-dominant carrier" is defined as "[a] carrier not found to be dominant [i.e., one that does not possess market power]."[38] The Commission has historically assessed "market power" in the relevant market[39] based upon an examination of:

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[38]47 C.F.R. §§61.3(o),(u).

[39]The NPRM and several commenters discuss in detail the relevant geographic market for interstate, interexchange services. While SBC continues to advocate the analysis applied to all telecommunications carriers of interstate, interexchange services for purposes of analyzing BOC market power, SBC also recognizes that the question of what is and is not "in region" in the context of a proposed merger is relevant for purposes of 1996 Act analysis of when a BOC can offer service. As set forth in the NPRM, in the context of a completed merger, the definition of "in region" includes the combined territories of the merged BOCs. However, because of the uncertainty that exists throughout the process that a merger will be completed, the Commission should not require any special separate affiliate requirements during the pendency of an announced merger.

a. the carrier's market share;

b. the supply elasticity of the market;

c. the demand elasticity of the carrier's customers (or, in a BOC's case, potential customers); and

d. the carrier's cost structure, size, and resources.[40]

Applying these factors to any new entrant, the Commission must determine that the separate BOC affiliate has no market power in the provision of interstate, interexchange services, regardless of the geographic market definition:[41]

a. the BOC affiliate has zero market share;

b. the supply and demand for any particular firm's interstate, interexchange services are relatively elastic; and

c. BOC affiliates bring no size, resource, or cost structure advantages to the market.

BOC affiliates entering interLATA markets will not possess market power or be able to manipulate market prices. If interLATA markets are currently deemed competitive, removing regulatory and legal barriers to BOC affiliate entry will not lead to market failure. Supply and demand elasticities are presumably sufficiently high to preclude any one firm, or small group of firms, from controlling market prices to the detriment of consumers. Consumers, particularly large businesses, are sophisticated and flexible enough to switch suppliers if one (or a few) attempt to raise prices significantly. Further, numerous suppliers have sufficient network capacity to accommodate increased consumer demand. BOC affiliate participation in these markets will serve only to increase available network capacity and add alternatives to the array

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[40]AT&T Order at 23.

[41]See Ameritech Comments at 8.

of suppliers already available to consumers. BOC affiliate interLATA entry, unfettered by additional burdensome regulatory restrictions, will strengthen and increase competitive activity in these markets.

3. DOMINANT REGULATION IS UNNECESSARY BECAUSE BOCS LACK MARKET POWER [Section VIII]

As pointed out by BellSouth and others, the Commission correctly analyzes this issue:[42] "each BOC affiliate will initially have a zero market share in the provision of in-region, interstate, domestic, interLATA services . . . the affiliate initially will not be able to profitably raise and sustain its price by restricting its output."[43] As the Commission states, "since all interLATA customers currently are served by the affiliates' competitors and could continue to be served by them after BOC affiliates enter the domestic interLATA market, we believe that the availability of this transmission capacity will constrain the BOC affiliates' ability to raise its domestic interLATA prices."[44] The notion that BOC affiliates could raise market prices is also effectively rebutted by USTA affiant Dr. Jerry A. Hausman, who states:

> BOCs would be extremely unlikely to be able to restrict long distance to raise prices. As the NPRM notes (¶ 133) the BOCs' affiliates will begin with zero market share, and the presence of AT&T, along with the other IXCs, makes it unlikely that the BOCs could gain market share quickly enough to allow them to exercise market power by restriction of output. Furthermore, the existence of competitors' networks provides a significant amount of supply capability to stop price increases.
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> Moreover, the BOCs will have an economic incentive to lower long distance prices from their current levels. Since prices for both access and long distance are

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[42]BellSouth Comments at 50; USTA Comments, Hausman Affidavit at 8-9; Ameritech Comments at 8-12.

[43]BellSouth Comments at 50 (citing NPRM at ¶133).

[44]Id.

> well above incremental (marginal) cost (including access), a BOC has an incentive to lower prices both to gain share from rival IXCs and also to expand the use of long distance so that access minutes increase. IXCs do not have this same incentive because they do not provide access. Thus, lower prices of long distance through an expansion of output, not a restriction of output, will be in the BOCs' best interests. This outcome of lower prices helps consumers and is pro-competitive, as common sense and economic theory demonstrate.[45]

Arguments that BOC interLATA affiliates will control interLATA service prices and thereby thwart the competitive process must be dismissed as either illogical or implausible. For example, some commenters present the notion that BOCs could favor their affiliates by raising their rivals' costs by either increasing carrier access charges paid by all interLATA service providers except BOC affiliates or degrading the quality of service provided to competitors. This theory presumes all attempts to encourage competitive entry into exchange access markets are doomed to failure. AT&T, MCI, MFS, Teleport, and others have already actually entered or announced intentions to enter local exchange and exchange access markets. Any attempted BOC price increase will simply result in rising BOC competitive losses, not BOC control of interLATA service prices.

In addition, arguments that BOCs in concert with their affiliates will successfully implement predatory pricing strategies (financed through cross-subsidization schemes or some other way) presume that BOCs can not only drive competitors from the market but destroy existing network capacity as well. Unless existing capacity disappears, bankrupt carriers will sell network assets to new (or other existing) providers that will supply interLATA services, thereby preventing rival firms from raising prices to monopoly levels. Since attempts to drive

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[45]USTA Comments, Hausman Affidavit at 8.

rivals from the market through anticompetitive practices (e.g., predatory pricing, "price squeezes" resulting from raising rivals' costs, etc.) will ultimately fail, there appear to be no compelling economic reasons for restricting either BOC entry or the BOCs' ability to fairly compete in interLATA telecommunications markets.[46]

4. BOC AFFILIATE INTERNATIONAL SERVICES NEED NO SPECIAL TREATMENT [Section VIII]

The Commission requests comment on regulatory treatment that should be applied to BOC affiliates providing in-region, international services, tentatively concluding that such services should be treated on the same basis as in-region, interstate, domestic, interLATA services. AT&T addresses this issue in a footnote, repeating the discredited market power analysis of its arguments relating to in-region regulatory treatment.[47] MCI supplements these arguments by proposing that BOCs be subjected to the same kinds of restrictions that resulted from its merger with British Telecom.[48]

Neither the Commission nor any commenter explains why the existing rules adopted to handle the regulatory treatment of United States carriers on international routes, particularly those dealing with "affiliations," are insufficient to deal with potential problem areas.[49] In

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[46]LDDS, AT&T, and TRA make vague allegations that parrot the NPRM that "the BOCs can use their market power in the provision of exchange and exchange access services by discriminating against interexchange competitors in numerous and subtle ways that would be exceedingly 'difficult to police, particularly in situations where the BOC's 'cooperation' with unaffiliated interLATA carriers is difficult to quantify.'" These fanciful and unsubstantiated "threats" should be dismissed along with the others. AT&T Comments at 63 (citing NPRM at ¶139); see also, e.g., LDDS Comments at 7-11; Excel Comments at 9.

[47]AT&T Comments at fn. 59.

[48]MCI Comments at 68-71.

[49]See 47 C.F.R. §63.10

addition, the Commission has already stated that it will deal with "special conditions" in the foreign carrier context, making MCI's Comments at best unnecessary.[50] To adopt MCI's proposed BOC-specific rule would ignore the Commission's stated ability to handle these matters on a case-by-case basis. MCI proposes a broad, inefficient rule without any corresponding benefit.[51] The Commission should defer any such determination until the facts of each situation are presented to the Commission.

5. TO ENSURE ADDITIONAL VIGOROUS COMPETITION, BOC AFFILIATES SHOULD BE PERMITTED TO PARTICIPATE AS DO ALL OTHER CARRIERS: ON A NON-DOMINANT BASIS [Section VIII]

Congress intended BOC affiliate participation in interLATA telecommunications markets to increase competitive activity, not simply to add suppliers to these markets without substantially improving consumer welfare. However, consumer benefits will not be realized if BOC affiliate entry into interLATA markets is hampered by the numerous regulatory restrictions accompanying their potential classification as dominant carriers.

As summarized in the AT&T Order,[52] non-dominant carriers have numerous regulatory advantages over dominant carriers:

a. Non-dominant carriers are not subject to any regulatory pricing constraints, such as price cap regulation.[53]

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[50]See MCI Comments at 69-71; See also, In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities, IB Docket No. 95-22, Report and Order (released November 30, 1995).

[51]See 47 C.F.R. § 63.14.

[52]See AT&T Order at ¶¶12-13.

[53]See 47 C.F.R. §§ 61.41-61.42.

b. Non-dominant carriers are allowed to file tariffs for all of their domestic services on one day's notice, and the tariffs are presumed lawful.[54]

c. Non-dominant carriers are not required to report or to file carrier-to-carrier contracts.[55]

d. Non-dominant carriers are not subject to several Section 214 requirements, including (a) non-dominant carriers are automatically authorized to extend services to any domestic point, and to construct, acquire, or operate any transmission lines, as long as they obtain Commission approval for the use of radio frequencies;[56] and (b) non-dominant carriers are only required to report additional circuits to the Commission on a semi-annual basis.[57] In addition, non-dominant carrier requests to discontinue or reduce service will be deemed granted after 31 days unless a party or the Commission objects.[58]

e. Non-dominant carriers, not being subject to price cap regulation, do not have to submit cost-support data now required for many dominant carriers' filings, such as tariff filings for new services.[59]

f. Non-dominant carriers are not subject to some annual reporting requirements, including ARMIS-like reports, an annual financial report, a depreciation rate report, an annual rate-of-return report, and a report of access minutes.[60]

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[54]Tariff Filing Requirements for Nondominant Carriers, CC Docket No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752 (1993) ("Tariff Filing Requirements Order"), vacated Southwestern Bell Corp. v. FCC, 43 F. 3d 1515 (D.C. Cir. 1995); Order on Remand, FCC 95-399, at paras. 8-9 (rel. September 27, 1995)("Tariff Filing Requirements Remand Order"); First Report and Order, 85 FCC 2d 1, 31-33 (1980).

[55]See 47 C.F.R.§43.51.

[56]47 C.F.R. §63.07(a). This requirement may have been eliminated for all carriers under Section 402(b) of the 1996 Act.

[57]Id. at §63.07(b). These requirements were also modified as to all carriers by Section 402(b) of the 1996 Act.

[58]Specifically, non-dominant carriers are (a) required to notify all affected customers in writing of the planned discontinuance, reduction or impairment unless the Commission authorizes another form of notice in advance; (b) required to file with the Commission an application indicating the change in service, on or after the date on which the notice has been given to all affected customers. The application will be automatically granted on the 31st day after the non-dominant carrier files its application with the Commission, unless the Commission has otherwise notified the carrier. See 47 C.F.R. § 63.71.

[59]See id. at §§61.38, 61.49.

[60]See id. at §§43.21, 43.22, 43.43.

The advantages of being a non-dominant carrier, particularly the advantage of filing tariffs on one-day's notice, are extremely important in a competitive market. A provider's ability to change prices without tipping its hand to competitors is essential. In order for any new entrant to the interexchange services business to compete effectively, it must be permitted to operate under the Commission's non-dominant carrier rules, the rules applied to all existing IXCs.

If deemed dominant carriers, BOC affiliates will be subject to stricter regulatory oversight than their competitors. Requests for price changes will require burdensome levels of cost support and entail significant time lags between business decisions to change prices and the date new prices are effective in the marketplace. Providing competitors with detailed cost information and announcing marketing and pricing intentions substantially before implementing those strategies will be significant competitive disadvantages in interLATA markets. Such sensitive information will enable other suppliers to undermine legitimate BOC affiliate competitive strategies. Knowing BOC affiliate cost structures and pricing plans, competitors will be able to identify market niches, assemble service packages, develop pricing plans, or otherwise render ineffective attempts to compete vigorously in interLATA markets.[61] Lacking convincing economic arguments, it would seem difficult to justify regulatory decisions to impede the ability of BOC affiliates to fairly compete in interLATA markets, thereby denying the additional consumer benefits that would result from the competitive efforts.

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[61] See USTA Comments, Hausman Affidavit at ¶34.

G. THE COMMISSION SHOULD FOLLOW THE SIMPLE AND CLEAR INTENT OF THE 1996 ACT IN ESTABLISHING ENFORCEMENT PROCEDURES) [Section VII]

In the NPRM, the Commission suggested certain tentative conclusions with respect to the enforcement procedures set forth in Section 271(d)(6) of the 1996 Act that were inconsistent with the clear intent of Congress as expressed in the plain language of that section. Predictably, in their comments, competitors of the BOCs eagerly leaped to support those tentative conclusions,[62] perceiving the tantalizing opportunity to hamstring BOC participation in the interLATA market by raising complaints in a process weighted heavily in their favor. The Commission must recognize those transparent attempts to defeat the further opening of the interLATA service market and give effect to the unambiguous statutory language without embellishment.

For example, the Commission tentatively concluded in the NPRM that Section 271(d)(6) "augments the Commission's existing enforcement authority" under Sections 206-209 of the Communications Act.[63] While AT&T and MCI happily voiced support for that conclusion,[64] the 1996 Act itself does not lend such support. Section 271(d)(6) is simply a mechanism by which the Commission can determine whether a BOC that previously had met the conditions for entry into the provision of interLATA services has ceased meeting such requirements. Section 271(d)(6) also provides remedies in the event of non-compliance with the conditions of entry that the Commission should take to ensure future compliance. Section 271(d)(6) prescribes a

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[62]MCI, at 52-55; AT&T, at 47-52.
[63]NPRM at ¶97.
[64]MCI Comments at 52; AT&T Comments at 49.

remedy particularly focused on ensuring compliance with other provisions of Section 271. There is no statutory support for the proposition that the enforcement provisions contained in Sections 206-209 of the Communications Act should also be applicable in the event of an allegation that a BOC has fallen out of compliance with the conditions set forth in Section 271.

In the NPRM, the Commission also expanded the statutory language into an elaborate construct in which a complainant can make a prima facie showing that a BOC has ceased to meet the conditions for provision of interLATA services set forth in Section 271. After such a "showing," the Commission proposes that the burden of proof should shift to the defendant BOC, which must then prove its innocence within the 90-day complaint period or risk incurring any or all of the range of penalties that the Commission may impose under Section 271(d)(6).[65] Again, AT&T and MCI, competitors that would benefit greatly from imposition of such penalties on a BOC providing interLATA services, jumped on the bandwagon with glowing support of those tentative conclusions.[66] In fact, AT&T boldly proposed that a complainant should simply be required to allege "specific facts which, if true, would constitute a violation by the BOC of Sections 271 or 272."[67] After a complainant files that simple pleading, at least according to AT&T, the burden of proof should shift to the BOC. The BOC would then be required to investigate the allegation and prove its innocence within the first fifteen days of the 90-day complaint period, a period that had commenced with the filing of the simple pleading.[68] If the BOC could not leap these ridiculous hurdles, it would risk sanctions, including suspension or

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[65]NPRM at ¶¶ 99-107.
[66]MCI Comments , at 53-57; AT&T Comments at 50-52.
[67]AT&T Comments at 50.
[68]AT&T Comments at 50-52.

revocation of its authorization to provide interLATA services, with the accompanying hardship to customers who could find their interLATA service provider hastily and precipitously put out of business. The 1996 Act did not in any way envision this sort of hasty and unfair exit mechanism when it crafted the roadmap for BOCs to provide robust competition by virtue of their entry into interLATA services.

The NYNEX's approach to the procedural aspects of a Section 271(d)(6) complaint proceeding is correct.[69] NYNEX proposes that in order for a complaint to state a prima facie case sufficient to commence the 90-day complaint period, it must provide substantial, verified evidence, with full documentation, of the complainant's reasons for believing that the defendant BOC had fallen out of compliance with the conditions set out in Section 271. Only with such a requirement can the Commission guard against the filing of frivolous, harassing complaints that are virtually impossible to answer because of their non-substantive nature. As NYNEX stated, the burden of proof should never shift; such a shift not only would be a violation of due process but also would be inconsistent with the intent and plain language of the 1996 Act. Instead of shifting the burden of proof, the Commission might shift the burden of producing evidence, but the presumption should favor the defendant BOC. If the Commission adopts a shift of the burden of producing evidence after a complainant sets forth a prima facie showing, the Commission should also adopt a complaint procedure that provides the defendant BOC with at least 45 days of the 90-day complaint period to provide the Commission with its own substantiated, verified response.

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[69]NYNEX Comments at 66-74.

H. MFS'S INTERNET-RELATED ARGUMENT SHOULD BE REJECTED

Claiming that "common sense" dictates that all "RBOC provided Internet Services should be considered an interLATA service for Section 271," MFS ignores the complex nature of the Internet and invites the Commission to formulate rules to protect MFS's narrow competitive interests at the expense of sound public policy. This is an invitation which "common sense" says should be rejected.

1. INTERNET SERVICES CAN BE PROVIDED ON AN INTRALATA BASIS.

MFS's unsupported assertions ignore the complex nature of the Internet and the fact that multiple entities contribute separate and distinct functions to what becomes Internet service. There is no basis by which to conclude that a BOC's provision of intraLATA service -- that simply allows the consumer to connect to an Internet Service Provider's ("ISP's") point of presence ("POP") inside the LATA using the traditional local loop -- is the provision of an interLATA information service.[70] Stated another way, a BOC's provision of local access service to customers who wish to call an ISP does not place the BOC in the position of being a provider of interLATA information services under the 1996 Act.

Were it otherwise, the impacts on the entire Internet community would be extraordinary.[71] These impacts would be felt not only by the BOCs, but by all Internet hardware,

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[70]In any case, SWBT's CEI Plan for Internet Support Services simply encompasses sales/billing-related activities for SWBT's separated affiliate. No reason existed to reject that plan even before MFS advanced its meritless claim. SWBT's CEI Plan should be approved expeditiously.

[71]For example, if what MFS claims is true, would ISPs and Internet transport providers owe interexchange access charges to LECs?

transport, and content providers. These companies number well into the hundreds (if not the thousands), and few if any have any notice that issues significant to their businesses have been raised in this proceeding.

2. ALL INTERNET SERVICES ARE NOT INTERLATA SERVICES UNDER THE ACT

MFS argues that, by specifically granting the BOCs authority to provide as an incidental service advanced telecommunications services, including Internet services, for schools and education on an interLATA basis, Congress somehow intended for all Internet services other than those provided to schools to be considered interLATA information services under the 1996 Act. There simply is no foundation for this interpretation. Section 271(g) was intended to permit the BOCs to provide Internet services on an interLATA basis--over dedicated facilities or otherwise--to schools.

Although such a service could be interLATA, it is not the type of service contemplated by SWBT's CEI Plan for Internet Support Services, or by Southwestern Bell Internet Services, Inc., SWBT's separate affiliate. Further, this carve-out does not, as MFS contends, render all other Internet-related services interLATA in nature. If Congress had intended to enact such a wholesale restriction, it would have been a relatively easy matter to specifically include the restriction in the language of the 1996 Act. The Commission should not allow this proceeding to be derailed by the tortured reading MFS gives the 1996 Act in order to reach its conclusions.[72]

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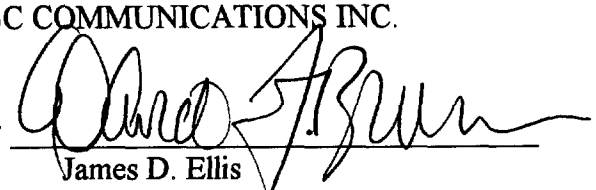
[72] To the extent that MFS asks the Commission to reach the highly complex issue of the relationship of the Internet to Title II of the Communications Act, SBC respectfully submits that this docket, which already deals with many complex implementation issues, is not the appropriate forum.

III. CONCLUSION

Rather than continuing the promulgation of regulations that effectuate policies Congress neither wrote nor intended, the Commission must give the intended effect to the words of Section 272. In the first instance, this means that the Commission need not write rules, but should simply enforce the separation and non-discrimination provisions of that Section. The 1996 Act, which was whole and balanced to reflect the compromises that accompanied the enactment of landmark legislation on February 8, 1996, should be neither tipped nor fragmented to serve interests that were considered prior to enactment. Instead, the Commission must read provisions such as Section 272 to harmonize their burdens and benefits. In this docket, harmony can be brought only through a balanced reading of Section 272's separate affiliate, non-discrimination, and joint marketing provisions to permit BOCs and their affiliates to compete fairly with the IXCs through creative joint marketing mechanisms on par with BOC competitors. Finally, this Commission must not impose on the BOC-affiliate IXCs a dominant carrier regime to which no others are subjected.

Respectfully Submitted,

SBC COMMUNICATIONS INC.

By 

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August 30, 1996

CERTIFICATE OF SERVICE

I, Liz Jensen, hereby certify that the foregoing Reply Comments of SBC Communications Inc. in Docket 96-149, have been served this 30th day of August, 1996 to the Parties of Record.

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